

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS G. SCOTT,

Defendant-Appellant.

UNPUBLISHED

July 25, 1997

No. 188906

Oakland Circuit Court

LC No. 95-137762 FC

Before: Jansen, P.J., and Wahls and P.R. Joslyn*, JJ.

MEMORANDUM.

Defendant appeals by right his jury convictions of armed robbery, assault with intent to rob while armed, and felony firearm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The sole issue raised on appeal is a claim by defendant that the trial court erred in refusing to conduct an evidentiary hearing on his motion to suppress the identification testimony of eyewitness Eleanor Hudler. At a lineup less than two weeks after the crime, Hudler identified another person than defendant as the robber. A week later, at preliminary examination, where defendant was the only Black male in the courtroom, she positively identified defendant as the robber. The trial court denied an evidentiary hearing without prejudice because no authority had been cited to indicate to the trial court that a preliminary examination could constitute a "suggestive pretrial confrontation" and could furnish the basis for suppression of identification testimony. Although the trial court invited subsequent citation of such authority and held open the prospect that such a hearing would then be held, no such authority was ever furnished.

The trial court was bound to follow the law, even if not cited to it by either party. *People v Glover*, 47 Mich App 454, 458; 209 NW2d 533 (1973). Preliminary examination may be an unduly suggestive pretrial confrontation, where a long period of time has elapsed since the crime, *People v Solomon*, 391 Mich 767; 214 NW2d 60 (1974), adopting 47 Mich App 208, 216; 203 NW2d 257 (1973) (Lesinski, C.J., dissenting), or where the witness initially gave a description of the perpetrator

* Circuit judge, sitting on the Court of Appeals by assignment.

substantially inconsistent with the defendant's appearance and was not

sequestered from other eyewitnesses during relevant confrontations. *People v Fuqua*, 146 Mich App 133, 144; 379 NW2d 396 (1985), questioned on other gds *People v Heflin*, 434 Mich 482, 499; 456 NW2d 10 (1990). Here, only three weeks elapsed between the crime and preliminary examination, and the witness' initial description of the perpetrator reasonably matched defendant as to height, weight, age, race, and facial hair. Mrs. Hudler was sequestered from other eyewitnesses. There was no error in denying an evidentiary hearing beyond that conducted at preliminary examination, at which these issues were explored and no basis for suppression.

Furthermore, even if Mrs. Hudler's testimony should have been suppressed, any error in admitting her preliminary examination testimony at trial was harmless, since the jury was aware that Mrs. Hudler had initially identified a different person at the lineup, and two other eyewitnesses, including a confederate in the crime, testified at trial and identified defendant as the robber. *People v Kurylczyk*, 443 Mich 289, 316; 505 NW2d 528 (1993).

Affirmed.

/s/ Kathleen Jansen
/s/ Myron H. Wahls
/s/ Patrick R. Joslyn